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CONSPIRACY REVISITED

RICHARD ARENS*

INTRODUCTION

The increasing reliance placed on massive group organization in the attainment of political and economic power objectives since the Industrial Revolution highlights the significance of such group organization as an instrumentality of both social integration and collapse. These conditions increasingly prompt direction of the available battery of criminal prosecution at threatening or seemingly threatening foci of group concentrations of both wealth and power. No contemporary industrial nation state has escaped these effects. Each has engaged in the increasing prosecution of group crime at the price of a diminution in the traditional protection accorded to the individual defendant by democratic justice.¹

In Anglo-American law, the trend of decision has been exemplified in the development of the doctrine of conspiracy. Standard definitions of the emerging doctrine, however, have only succeeded in raising more questions than they could answer.² Mr. Justice Jackson enjoyed the overwhelming support of contemporary legal scholarship in this comment on the prevailing anarchy of conspiracy categorization:

The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent.³

The conspiracy doctrine thus deserves renewed examination in the light of its continued expansion and inherent ambiguity. One may do well, therefore, to pose the classic inquiry once again:

"Upon what meat doth this our Caesar feed
That he is grown so great?"

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1. See, e. g., Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948). Cf. Wagner, *Conspiracy in Civil Law Countries*, 42 J. CRIM. L. & CRIMINOL. 171 (1951).

2. See, e. g., 3 BURDICK, *THE LAW OF CRIME* § 985 (1946): "Owing to the various ends and means of conspiracies, and for the further reason that there is much difference in judicial opinion as to the interpretation of the word 'unlawful' as used in such cases, it is very difficult to frame a definition of conspiracy that will cover all cases. In fact, it has been said that it is, perhaps, more difficult to give exact definition of conspiracy than any other crime." SEARS AND WEIHOFEN, *MAY'S LAW OF CRIMES* 168-171 (4th ed. 1938). Cf. Harno, *Intent in Criminal Conspiracy*, 89 U. of LA. L. REV. 624 (1941): "In the long category of crimes, there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than 'conspiracy.'" See also Pollack, *Common Law Conspiracy*, 35 GEO. L. J. 328, 329 (1947): "It can be unequivocally affirmed that the crime of conspiracy at common law is the most difficult to define."

3. Mr. Justice Jackson, concurring, in *Krulewitch v. United States*, 336 U. S. 440, 446 (1949).

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I.

The foundation for the contemporary law of conspiracy was laid by the inception of the conspiracy prosecution in medieval England. It is significant that the first discoverable concept of "conspiracy" was that of a "consummated" as distinct from an "inchoate" offense, (successively viewed as civil, quasi-criminal, and criminal in character). Early "conspiracy" by its inherent nature, was therefore marked by the inevitable presence of manifest harmful effects or "substantive evil".

Concise and classical summary of the "sea-change" undergone by this concept in the course of its early development has been provided by Sir James Fitzjames Stephen:⁴

The crime of conspiracy . . . has a remarkable history. In very early times the word has a completely different meaning from that which we attach to it. This appears from two early statutes, the first is the *Articuli super Chartas* (28 Edw. 1, A. D. 1300) which was intended to supplement and enforce Magna Charta. The tenth chapter begins: 'In right of conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, the king has provided remedy for the plaintiffs by a writ out of chancery. And notwithstanding he willeth that his justices of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office shall upon every plaint made unto them award inquests there-upon without writ, and shall do right unto the plaintiffs without delay.'

In the 33 Edw. 1 (1304) there is a definition of conspirators: 'Conspirators be they who do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries of fees to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords which by their seignory office or power undertake to bear and maintain quarrels, pleas, or debates that concern other parties than such as touch the estates of their lords or themselves.'

The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ, were the forerun-

4. 2 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 227-229 (1883). For similarly brief summary of early legal history, see Harno, *Intent in Criminal Conspiracy*, 89 U. OF PA. L. REV. 624, 624-625 (1941).

ners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury but like many other civil injuries it was also punishable on indictment, at the suit of the king, and upon a conviction the offender was liable to an extremely severe punishment which was called 'the villian judgment'.

So ingrained was the view of conspiracy as a substantive offense in this vein that as late as the 17th century "conspiracy" could still command the argument that it was an offense requiring the procurement of harmful results to be actionable.⁵ It could thus still be "moved and strongly urged by defendants' counsel, that admitting . . . (a) combination, confederacy, and agreement between . . . [defendants] to indict the plaintiff to be false, and malicious, . . . yet no action lies for it . . . (if) the party grieved . . . [has been] indicted, and *legitimo modo acquittatus*."⁶ This argument was presented in the celebrated *Poulterers' Case* and was rejected by the Court of Star Chamber.⁷ There, plaintiff, after securing his acquittal in criminal trial, had brought suit against a combination of poulterers who had acted as the complaining witnesses against him in pursuance of an "agreement betwixt them falsely and maliciously to charge the plaintiff [who had married the widow of a poulterer] . . . with the robbery of . . . [one of the defendants] . . . to procure him to be indicted, arraigned, adjudged, and hanged."⁸ In what turned out to be a classic departure from the earlier law, though justified by reference to dubious common law precedents, the Court of Star Chamber, allowed the writ upon the theory that the mere act of wrongful agreement of two or more persons to commit maintenance suffices to make a "conspiracy" actionable. No further action was deemed necessary.⁹

And it is true that a writ of conspiracy lies not, unless the party is indicted, and *legitimo modo acquietatus*, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution is full and manifest in our books; . . . confederacy to indict or acquit, although nothing is executed, is punishable by law . . . [Before] the unlawful act . . . [is] executed the law punishes the coadunation, confederacy or false alliance to

5. A change in the concept of necessary harmful results had however become manifest. See, e. g., 3 COKE INSTITUTES 142-143. Cf. HARRISON, CONSPIRACY AS A CRIME AND AS TORT IN ENGLISH LAW 13 (1924). See also, generally, WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921); 4 BLACKSTONE, COMMENTARIES c. X, 136-137.

6. *The Poulterers' Case*, (1611) 9 Coke Rep. 55 b., 77 Eng. Rep. 813.

7. *Ibid.*

8. *Ibid.*

9. *Id.*, Eng. Rep. 814-815.

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the end to prevent the unlawful act . . . and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it.

It may well be said that "[w]ith the decision in the *Poulterer's Case* a new crime was in the making. It [conspiracy] became an inchoate crime similar to attempt."¹⁰ Unlike "attempt" which was characterized by acceptance of such concrete standards as dangerous proximity to specific harms, "conspiracy" seemed endowed with a transcendent vagueness as to means and ends. The precise nature of the sought for preventive rather than punitive function which it was to fulfill as a "law of mercy" remained hazy. Sir James Fitzjames Stephen, in viewing this Star Chamber doctrine as adopted in due course by the Court of King's Bench, remarked that it was expressed so widely or loosely, that it became in course of time a head of law of great importance, and capable of almost indefinite extension."¹¹ It may well be added in fact, that the creative potential of "conspiracy" inhered in the very vagueness of its concept.

The "making" of the "new crime" was first highlighted by case law.

In 1663, the Court of King's Bench, allowed a prosecution for a "conspiracy for lucre and gain" which was not based on any attempt at the abuse of judicial procedure, but instead upon an attempt "to extort several sums of money" by a threat "to disgrace one with a bastard."¹²

In 1664, the same court sustained an information for conspiracy against London brewers which alleged that they did "factionously and unlawfully assemble . . . and conspire to impoverish the excise-men, and made orders that no small-beer . . . should be made . . . to be sold to the poor . . . but of such a price, with intent to move the common people to pull down the Excise House, and bring the excise-men into the hatred of the people, and to impoverish and disable them from paying their rent . . . to the King." The majority of the Court held "that the bare conspiracy in this case to diminish the King's revenue, without any act done is finable." Thereupon, the report notes, "they fined [one defendant] . . . 1000 marks and the others 300 marks each."¹³ It was clear that in becoming an inchoate offense, conspiracy had been emancipated from the restrictions of its original status.

10. Harno, *supra* note 4 at 626.

11. STEPHEN, *op. cit.* *supra* note 4 at 229.

12. *The King against Tymberly*, (1663) 1 Keb. 254, 83 Eng. Rep. 930; Cf. *The King against Rispal*, (1762) 96 Eng. Rep. 206.

13. *The King against Alderman Sterling and seventeen others*, (1664) 1 Lev. 126, 83 Eng. Rep. 331.

It is recognized, in passing, that the "acceptance of this [Star-Chamber] doctrine, in its broad implications, by the common law courts . . . did not come about without some misgivings."¹⁴

A creature of the courts, a foot-loose conspiracy doctrine appeared unpredictable. From early times its character was derived from the offense on which it was "overlaid." Could it be safely overlaid on many others? In due course the experiment was under way. Thus conspiracy entered a period of growth and mutation within the expanding confines of a changing Criminal Law:

[M]any acts were coming to be regarded as crimes which had not been formerly so regarded, and consequently combinations to do such acts were treated as criminal conspiracies.¹⁵

The emerging form of conspiracy was classically characterized by Lord Denman as embodying an agreement "either to do an unlawful act, or a lawful act by unlawful means."¹⁶ The meaning of "unlawful" remained vague but received an increasingly liberal construction. Thus the contemplated illegality could clearly be a statutory violation; but it could also be a combination directed against the financial or political interest of the government¹⁷ or against the general public interest¹⁸ or against public morality,¹⁹ all without necessarily connoting a specifically proscribed criminality.

In this context it was the illicit agreement or combination which rendered all parties thereto punishable without any further action. Beyond the enactment of this measure of individual responsibility for group participation the new law held each conspirator liable for the acts of his fellows in furtherance of the general criminal design to which all were parties.²⁰

More than a century ago the law of conspiracy had thus become a potential weapon of almost unlimited repression in the service of industrialized society.

14. Harno, *supra* note 4 at 627.

15. HARRISON, *op. cit.* *supra* note 5 at 20.

16. *The King Against Jones And Others*, 4 B. & Ad. 345 (1832), 110 Eng. Rep. 485, 487: "The indictment ought to charge a conspiracy, either to do an unlawful act, or a lawful act by unlawful means".

17. *Journeyman Taylors of Cambridge*, (1721) 8 Mod. 10, 88 Eng. Rep. 9. See also *R. v. De Berenger*, (1814) 3 M & S 67 declaring that a criminal conspiracy could be founded on an agreement to raise the price of public funds by spreading rumors. A good discussion of many of the early conspiracy cases is provided in *State v. Buchanan*, 5 H and J. 317 (Md. 1821).

18. See, e. g., *O'Connell v. Regina*, (1844) 11 Cl. & F. 155.

19. *Rex v. Delaval*, (1763) 3 Burr. 1434, 97 Eng. Rep. 913.

20. *Rex v. Stone*, (1796) 100 Eng. Rep. 684.

For a brief view of the further development of this aspect of the conspiracy doctrine see MILLER, HANDBOOK OF CRIMINAL LAW 114 (1934).

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Recent history has brought about even more significant changes in the development of the dominant patterns of this "conspiracy."

Since the Industrial Revolution, the growth of the conspiracy doctrine has been virtually uninhibited. In consequence the doctrine has reached more and more phases of the community process. Today the once fledgling law of conspiracy seems to have come of age. It is not unfair to state that its contemporary magnitude far exceeds the fondest expectations entertained by its Star Chamber progenitors for its future. Its contemporary portrayal throws such traits as these in bold relief. It suffices today under, e. g., contemporary federal criminal law, if the "illicit" agreement to be established as the foundation of the "conspiracy" is shown as directed not at the violation of a criminal statute but at a civil statute,²¹ or even at internal administrative regulations with a view to "impairing, obstructing or defeating the lawful function of any department of government."²² A characteristic example of state criminal legislation renders actionable not only an agreement to commit crime, falsely and maliciously indict another for crime, falsely to institute or maintain "an action or special proceeding", etc., etc., but also to "commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice."²³

In this contemporary context, it is also the illicit agreement or combination which renders all parties thereto punishable without any further action. Beyond the enactment of this measure of individual responsibility for group participation the contemporary law, too, holds each conspirator liable for the acts of his fellows in furtherance of the general criminal design to which all are parties.²⁴

As the scope of the conspiracy concept has continued to increase in size the requisite proof for the establishment of the underlying agreement in conspiracy prosecutions has significantly shrunk. Thus, today, it is permissible to prove the crime of conspiracy by a showing of the requisite mental state within the context of the appropriate association of would-be malefactors. The requisite mental state, however, need not be shown to have

21. *United States v. Winner*, 28 F. 2d 295 (N. D. Ill. 1928); *United States v. Hutto*, 256 U. S. 524 (1921).

22. See *Haas v. Henkel*, 216 U. S. 462, 479 (1910). Cf. *Bridges v. United States*, 346 U. S. 209 (1953). For underlying statute see 18 U. S. C. § 371.

23. See N. Y. PENAL LAW § 580. Cf. Ill. Rev. Stat. c. 38 § 138 (1951) and the discussion of operative Illinois concepts of "conspiracy" in *Proposed Revisions in the Illinois Criminal Code*, 48 NORTHWESTERN U. L. REV. 198, 204-210 (1953).

24. See e. g., *Pinkerton v. United States*, 328 U. S. 640 (1946). Cf. *People v. Lyon*, 1 N. Y. Crim. 400 (1883), *aff'd*, 33 Hun. 623 (1884).

become manifested by simultaneous action or agreement between the conspirators.²⁵ The association which is established need not be direct and simultaneous, and may be tenuous and indeed invisible to the bare eye.²⁶ A conspirator may, in fact, be ignorant of the very identity of his conspiratorial associates.²⁷ For there is much that is peculiar to the contemporary law of conspiracy:

A conspiracy is an offense which is usually established by a great number of apparently disconnected circumstances which, when taken together, throw light on whether the accused have an understanding or are in common agreement. The agreement need not be in any particular form. It is sufficient that the minds of the parties met understandingly. A mutual implied understanding is sufficient so far as the combination or confederacy is concerned. The agreement is generally a matter of inference, deduced from the acts of the persons accused, which are done on pursuance of an apparent criminal purpose, that is to say, it is not necessary that the participation of the accused be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. This is so because it is rarely capable of proof by direct evidence.²⁸

It has been observed in this connection, that "[t]he liberality with which the courts have permitted the prosecution of business enterprises for engaging in conspiracies to monopolize or restrain trade is the most significant example of . . . (a) relaxation of proof. In attaching liability for violations of the Sherman Act, the courts have tended to direct their attention to the presence of proscribed activities, instead of to the evidence of the accused's intent. By engaging in concerted economic activities which operate in fact to restrain trade, the defendants may be charged with having agreed to effect the unlawful results, thereby making proof of a specific intent to restrain trade unnecessary."²⁹ One wonders at what stage the described "relaxation of proof" effects the creation of a new substantive crime by judicial fiat.

It appears almost as though the development of the "conspiracy" doctrine has thus moved full circle—from its medieval

25. *Schenk v. United States*, 253 Fed. 212, 213 (E. D. Pa. 1918), *aff'd*, 249 U. S. 47 (1918). Cf. discussion of "generic conspiracies" for purposes of criminal prosecutions under the Sherman Act in DESSON, CRIMINAL LAW, ADMINISTRATION & PUBLIC ORDER 526-527 (1948). Cf. *Kelley v. People*, 55 N. Y. 565 (1874).

26. See *Allen v. United States*, 4 F. 2d 688 (7th Cir. 1925); *United States v. Georgia*, 210 F. 2d 45 (3d Cir. 1954). Cf. *Rex v. Meyrick & Ribuffi*, (1929) 21 Cir. App. R. 94, 45 T. L. R. 421; *William Goldman Theatres v. Loew's Inc.*, 150 2d 738 (3d Cir. 1945).

27. *Rex v. Meyrick & Ribuffi*, *supra* note 26; *United States v. Direct Sales Co.*, 44 F. Supp. 623 (W. D. S. C. 1942).

28. *United States v. Glasser*, 116 F. 2d 690, 699-700 (7th Cir. 1940).

29. Note, *Guilt by Association—Three Words in Search of a Meaning*, 17 U. of CHI. L. REV. 148, 153-154 (1947) and see cases cited therein. Cf. *McKernan v. Fraser*, (1931) 46 Commonwealth L. Rep. 343.

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inception as a "consummated" offense, marked by the inevitable presence of manifest harmful effects or "substantive evil", through its metamorphosis as an "inchoate" crime, designed to "prevent the malignant from doing mischief, and the innocent from suffering it" under a "law of mercy" to its contemporary culmination in a dual role either an "inchoate" offense or more significantly as a "consummated" substantive crime, marked by the presence of manifest harmful effects or "substantive evil", which can be exemplified by "economic activities which operate in fact to restrain trade."

Contemporary life is marked by a rising abundance of both types of conspiracy prosecutions.

As the pattern of "conspiracy" prosecutions continues to unfold in mounting tempo, it is not surprising to detect judicial recognition of the "conspiracy" tool as frequently harsh and arbitrary.³⁰

II.

It is one of the facts of the life of the law that the prosecutor appears irresistibly drawn to the conspiracy prosecution. What, we may ask, are the fatal charms exerted by the law of conspiracy to effect such a magnetism?

The characteristic contemporary conspiracy doctrine, aside from the "chameleon-like . . . special coloration" it derives "from each of the many independent offenses on which it may be overlaid" can perhaps be best described as conformable to the following standards of both substantive and procedural content:

1. A "conspiracy" is an agreement between two or more persons either to do an unlawful act, or a lawful act by unlawful means.³¹

30. See Saeta, *Prohibition and the Hawkins Doctrine*, 66 U. S. L. Rev. 75, 81, n. 49 (1932), quoting Taft, C. J., Meeting of Senior Circuit Judges, June 16, 1925, reproduced in part in DESSON, CRIMINAL LAW, ADMINISTRATION & PUBLIC ORDER (1948) 531. See also Hand, J. speaking for the Court in *United States v. Falcone*, 109 F. 2d 579, 581 (2d Cir. 1940):

[Today] many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is, only by circumscribing the scope of such all comprehensive indictments that they can be avoided.

Cf. *Hudspeth v. McDonald*, 120 F. 2d 962 (10th Cir. 1941); *Hyde v. United States*, 225 U. S. 34 (1911).

31. *The King Against Jones*, (1832) 4 B & Ad. 345, 110 Eng. Rep. 485, 487. See also *United States v. Westbrook*, 114 F. Supp. 192, 196 (1953):

[The] gist of the crime of conspiracy is the unlawful agreement and . . . where a conspiracy is alleged it is not necessary to set out the criminal object of the conspiracy with as great certainty as is required in cases where such object is charged as a substantive offense.

The full meaning of "lawfulness" within this context does not appear to be firmly settled for all cases. Thus, e. g., an agreement may be turned into a criminal conspiracy even though the attainment of its objective seems impossible at the time of its consummation.³² Moreover, the legislature "may make it a crime to conspire with others to do what an individual may lawfully do on his own."³³

In the words of the United States Supreme Court:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, some times quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.³⁴

The requirement has never been officially repudiated that the agreement, underlying an actionable conspiracy, be characterized by a *specific intent* "either to do an unlawful act, or a lawful act by unlawful means." It is traditional, therefore, to declare that "conspiracy involves a specific intent to commit a particular act, the perpetration of which the state [or government] desires to forestall."³⁵ A corollary of such a declaration is the rule that "to establish a criminal conspiracy . . . [the] state [or government] must prove an agreement on the part of two or more persons and it must prove that the common intent flowing from that agreement was specific and was criminal."³⁶

2. The existing standards of proof in this field frequently obviate the presentation of independent evidence to prove the necessary specific intent with regard to:

(a) the formation of the conspiracy, (b) the objective of the varying co-conspirators; throughout their operation such standards tend to the advantage of the prosecution and the disadvantage of the defense in the general development of trial tactics.

32. See, e. g., *United States v. Perlstein*, 126 F. 2d 789 (3d Cir. 1942), *cert. denied*, 316 U. S. 678 (1942).

33. Mr. Justice Jackson concurring, in *Dennis v. United States*, 341 U. S. 494, 573 (1951). Cf. *State v. Kemp*, 126 Conn. 60, 9 A. 2d 63 (1939).

34. *United States v. Rabinowich*, 238 U. S. 78, 88 (1915). Cf. *State v. Kemp*, *supra* note 33. See also, SEARS AND WEIHOFEN, *MAY'S LAW OF CRIMES* 169-170 (4th ed. 1938).

35. Harno, *supra* note 4 at 635.

36. *Ibid.*; cf. CLARK & MARSHALL, *A TREATISE ON THE LAW OF CRIMES* § 126 (1952); SEARS & WEIHOFEN, *op. cit. supra* note 34 at 128.

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Since conspiratorial methods are assumed to be "devious, hidden, secret and clandestine",³⁷ the gist of the crime, i. e., the illicit agreement is not deemed susceptible to proof by independent circumstantial evidence and may instead be freely inferred from the circumstances of the overt association, however remote their logical relevance to the crime charged. The judicial discretion available in the admission of such "logically relevant" evidence within such a context appears almost immune from any effective allegation of abuse. In the words of a recent decision:³⁸

It should be borne in mind that in a conspiracy case wide latitude is allowed in presenting evidence and it is within the discretion of the trial court to admit evidence which *even remotely* tends to establish the conspiracy charged.

In this context, moreover, as has been noted notwithstanding the judicial reiteration of a necessity for a showing of a "common design", the prosecution is not bound to establish the necessary conspiratorial connection of an individual defendant by a showing that he joined the conspiracy in the beginning simultaneously with its founders, or "that he . . . [had] complete knowledge of all the aims of the conspirators, or that he . . . [took] part in each branch of the conspiracy, or that he even . . . [knew] of all the steps taken toward the common design . . ."³⁹ As has been indicated above, a conspirator may in fact be ignorant of the very identity of his conspiratorial associates and still not escape criminal liability.⁴⁰

In the presentation of such a case for conspiracy it suffices to establish no more than a *prima facie* case of conspiracy to effect the tentative admission into evidence of any statement made by any one co-conspirator in the course of the conspiracy and concerning the subject thereof against all of the remaining co-conspirators on trial.⁴¹ Rationalization of such a procedure is founded on the assumption that ". . . when a conspiracy is established,

37. *Marrash v. United States*, 168 Fed. 225, 229 (2d Cir. 1909).

38. *Schine v. United States*, 209 F. 2d 67, 74. (9th Cir. 1954). (Italics supplied). Cf. *Alaska S. S. Co. v. International Longshoremen's Ass'n of Puget Sound*, 236 Fed. 964 (W. D. Wash. 1916); *People v. McCarthy*, 256 App. Div. 522, 10 N. Y. S. 2d 978 (4th Dep't 1939).

39. See *Ballantine v. Ferretti*, 28 N. Y. S. 2d 668, 691 (Sup. Ct. 1941); *United States v. Harding*, 81 F. 2d 563 (D. C. Cir. 1936). Cf. *Schenck v. United States*, 253 F. 212, 213, (E. D. Pa. 1918), *aff'd*, 249 U. S. 47 (1918). See also *Coates v. United States*, 59 F. 2d 173, 174 (9th Cir. 1932):

"It is immaterial when any of the parties entered the polluted stream. From the moment he entered he is as much contaminated and held as though an original conspirator".

Cf. *American Tobacco Co. v. United States*, 147 F. 2d 93 (6th Cir. 1944); 328 U. S. 781 (1946). *William Goldman Theatres v. Loew's Inc.*, 150 F. 2d 738 (3d Cir. 1945).

40. *Rex v. Meyrick and Ribuffi*, *supra* note 26; *United States v. Direct Sales Co.*, *supra* note 27. See also *Martin v. United States*, 100 F. 2d 490 (10th Cir., 1939).

41. See, e. g., *Carnahan v. United States*, 35 F. 2d 96 (1929).

everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by every one of them and may be proved against each."⁴²

Proof of conspiratorial liability for the act of another, moreover, is specifically facilitated by the rule that while a member of the "conspiracy", each conspirator is vicariously liable for all crimes committed by his "co-conspirators" which can be said to flow naturally from the criminal design [to which he has become a party], even if such crimes have not been specifically foreseen or ratified as plausible consequences by himself or his "co-conspirators" at any time. In the contemplation of the law "he has started evil forces [and] he must . . . [therefore] incur the guilt of their continuance."⁴³ The explicitly underlying theory is that ". . . (a) conspiracy is a partnership in criminal purposes."⁴⁴ Partnership liabilities as to the component members continue until effective withdrawal from the conspiratorial association or until the consummation of the conspiratorial purpose itself. This is exemplified by the holding that any "overt act of one partner may be the act of all without any new agreement specifically directed to that act."⁴⁵ As long, therefore, "as the partnership in crime continues, the partners act for each other in carrying it forward . . . The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator [instigates] . . . the commission of the crime . . . [The] overt act of one partner in crime is [thus] attributable to all."⁴⁶ In this context, any distinction between "agreeing" and "aiding and abetting" appears at best hazy and at worst non-existent.⁴⁷

In consequence of the emerging judge-made law effecting the hopeless intermingling of "conspiracy" with the law of parties,⁴⁸

42. 11 AM. JUR. CONSPIRACY, § 40. See also *Agnello v. United States*, 269 U. S. 20 (1925); *Wiborg v. United States*, 163 U. S. 632 (1896).

43. *Hyde v. United States*, 225 U. S. 347, 369-370 (1912).

44. *United States v. Kissel*, 218 U. S. 601, 608 (1910).

45. *Ibid.*

46. *Pinkerton v. United States*, 328 U. S. 640, 646-647 (1946).

47. See, e. g., Mr. Justice Jackson's comment on this type of analysis in *Krulewitch v. United States*, 336 U. S. 440, 451 (1949).

48. See, e. g., *Smith v. State*, 8 Ala. App. 187, 62 So. 575, 577 (1913):

"At common law a person may be connected with a felony either as a principal in the first degree, as a principal in the second degree, or aider or abettor, as an accessory before the fact, or as an accessory after the fact. A principal in the first degree is he that is the actor or absolute perpetrator of the crime. A principal in the second degree is one who, at the time of the commission of the felony, is present either near enough to render assistance to the main design should the need arise—and aids or abets in its commission . . . An 'accessory' is one who is not the chief actor in the felonious

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the standard of proof for the establishment of responsibility for the act of another in criminal conspiracy is significantly reduced beyond that maintained for the establishment of responsibility for the physical act of another in ordinary crime. The character of principal and conspirator respectively drawn from the law of parties and of conspiracy, coalesce in the confines of a new judge-made conspiratorial doctrine, invoked by judicial fiat. Where, however, the traditional law of parties had enacted the establishment of "aiding and abetting" as a fact to be proved beyond reasonable doubt (the showing of an illicit mutual agreement providing at best a link in a developing chain of independent evidence),⁴⁹ the new law of conspiracy declares in effect, that the mere proof of such an agreement operates as an irrebuttable pre-

Footnote continued from preceding page

offense, nor present at its perpetration, but is in some way concerned therein either before or after the act is committed."

For the change wrought by a characteristic example of the contemporary statutory law of parties, see 18 U. S. C. § 2:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States is also a principal and punishable as such."

18 U. S. C. § 3:

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. . . ."

Cf. N. Y. PENAL LAW § 2, defining a principal as: ". . . (a) a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime . . ." and an accessory as ". . . (a) person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted or has committed a felony . . ."

A blurring of any existing borderline between the law of conspiracy and the law of parties is characteristic of a plethora of felony-murder prosecutions. See e. g., *People v. Ryan*, 263 N. Y. 298 189 N. E. 225 (1934); *People v. Weiner*, 248 N. Y. 118 161 N. E. 441 (1928).

49. See, e. g., Perkins, *Parties to Crime*, 89 U. OF PA. L. REV. 581 (1941). See particularly, *Id.* at 618-620:

"If there is no evidence of defendant's guilt except on the theory that he caused a crime to be committed by another (whether by incitement or abetment), it will obviously be necessary for the prosecution to prove the crime was actually committed by another, and this must be established with the same certainty as if the perpetrator himself were on trial . . . (beyond that the) only sound procedure . . . is that the guilt of an inciter 'must be determined upon the facts which show the part he had' in the offense . . . Needless to say, substantial rights . . . should be safeguarded."

sumption of the requisite "aiding and abetting", for purposes of vicarious liability.⁵⁰

The above standards appear hopelessly at odds in the apparent clash between the requirements of *specific intent*, vicarious liability and the sufficiency of relevant evidence. The existing confusion appears best reflected in any attempt at the reconciliation of the irreconcilable. A standard authority's attempt at enlightenment is not helpful:⁵¹

There seems to be no doubt that in order to convict one of being a party to a criminal conspiracy it is necessary to show that he had a specific intent, i. e., he actually intended to combine with another for the actual accomplishment of the prohibited result or the use of the prohibited means. Suppose, however, that a defendant admits all just stated but truthfully asserts that he was ignorant of the fact that the 'prohibited result' was a violation of law; in other words he acted innocently in one sense of the word. Does the lack of this knowledge, a state of mind, excuse him from a charge of criminal conspiracy even though he may be guilty of another crime if the prohibited result has been effected? The correct answer to this has been asserted to be in the affirmative; but it appears to be a matter that requires refined reasoning and there are decisions that appear to give a contrary answer.

The confusion in question, however, does not tend to the incapacitation of the criminal prosecution; quite the contrary—it serves effectively only to confound the criminal defense. It has thus been noted that the "frequent practice of putting large numbers of defendants on trial together . . . [facilitates] the task of the prosecution, is . . . apt to confuse the jury, and to raise . . . [an] unwarranted implication of guilt" and that "the rule that the acts and declaration of his co-defendants should be admissible against . . . [the alleged conspirator] only *after* the conspiracy is proved is, owing to the nature of the conspiracy trial, usually of little practical protection to the individual defendant."⁵²

50. See Mr. Justice Jackson, concurring in *Krulewitch v. United States*, 336 U. S. 440, 451 (1949):

"A recent tendency has appeared in this Court to expand this elastic offense (i. e. conspiracy) and to facilitate its proof. In *Pinkerton v. United States*, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489, it sustained a conviction of a substantive crime where there was no proof of participation in or knowledge of it, *upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting.*" (Italics supplied).

Cf. *Rent v. United States*, 209 F. 2d 893 (5th Cir. 1954).

51. SEARS AND WEIHOFEN, *op cit supra* note 34 at 18.

52. *Proposed Revisions in the Illinois Criminal Code*, 48 NORTHWESTERN U. L. REV. 198, 205-206 (1953).

Cf. *Kotteakos v. United States*, 328 U. S. 750 (1946); *United States v. Bruno*, 105 F. 2d 921 (2d Cir. 1939).

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The fatal charms exerted by the rules of conspiracy may then be said to be the obviation of numerous difficulties of proof and the consequent operation of the conspiracy doctrine as a judge-made law of substantive crime in areas devoid of what is judicially deemed adequate traditional legislation. The areas of economic and political crime seem to furnish the greatest incentive for the contemporary invocation of conspiracy.⁵³

III.

The assertion that “. . . [the] picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats, close together belongs to a darker age”⁵⁴ is perhaps best borne out in the essentially economic sphere of conspiratorial activity.

Conspirators in that sphere are rarely if ever, viewed as “sinister persons” at all; a convincing proof of their specific conspiratorial intent appears always difficult if not impossible. Adequate and readily enforceable laws covering what at any moment may be viewed as “undesirable” economic activities are few and far between; in consequence what may look like “conspiratorial activity” to the elite may seem indistinguishable from respectable business practice to wider strata of the populace; moreover widespread forms of economic conspiracy are rarely reminiscent of the incomplete offense whose growth invokes the preventive action of the conspiracy doctrine as a part of the law of inchoate crimes. There is, in fact rarely anything “inchoate” about the “conspiratorial” economic transaction which awaits discussion.

Such a transaction is cognizable, for the most part, as the carrier of an immediate harm which appears past prevention. (This, of course, is not meant to deny the possibility of its inherent potential for more long-range detriment, a detriment against which preventive measures might still be invoked.) Applied to such a situation, the conspiracy doctrine appears primarily directed at the repression of the manifest effects of “substantive evil” and only secondarily at that of the preparatory confederations toward such an ends. In such a context, the function of the doctrine appears more punitive than preventive and therefore

53. See Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L. J. 1019 (1949); HALL, *THEFT, LAW AND SOCIETY* 155-345 (2d ed. 1952). Cf. Donnelly, *The New Yugoslav Criminal Code*, 61 YALE L. J. 510; Nathanson, *The Communist Trial and the Clear and Present Danger Test*, 63 HARV. L. REV. 1167 (1950); Arens, *Nuremberg and Group Prosecution*, [1951] WASH. U. L. Q. 329.

54. TNEC Report, as quoted by Feahy, J. in *William Goldman Theatres, Inc. v. Loew's, Inc.* 150 F. 2d 738, 743, (3rd Cir. 1945) and again by Goodrich, J., in *United States v. Georgia*, 210 F. 2d 45, 48 (3d Cir. 1954).

essentially indistinguishable from that of the law governing objective crime. In a sphere which is thought to be insufficiently covered by the "do's" and "don'ts" of traditional substantive law, the conspiracy doctrine lends itself to use as a judicial makeshift for a modern code of criminal regulatory legislation.

The special coloration, assumed chameleon-like by conspiracy in this habitat, is vividly demonstrable against the respective backgrounds of traffic in "contraband" and enterprise "in restraint of trade."

Inherent within most judicially encountered conspiracies involving the sale of contraband, without more, is the effect of manifest harm to the social order, i. e. the continued presence or circulation within the body politic of the actually or potentially dangerous or harmful articles under prohibition. The question presented in cases of the sale of "contraband" goods is therefore whether infliction of criminal sanctions is to be restricted to the active organizers of the traffic under the law of substantive crimes or whether it is to extend to the passive participant e. g. "a 'wise' owner of innocent goods which contribute to . . . [an] illegal . . . [operation]", or, e. g.; to an "ignorant" owner under identical circumstances, etc., on the theory of conspiracy. In the absence of legislative guidance the answer appears to have been furnished by a substantive law created by judicial fiat.

The trend of decision has demonstrated that ". . . [in] criminal actions charging the seller as a co-conspirator the courts . . . have been . . . inclined to treat the seller as a participant in the buyer's illicit enterprise. Knowingly giving the buyer aid by selling him goods has been regarded as the equivalent of an express agreement between the seller and the buyer to act in concert, thereby making the seller an active participant."⁵⁵

A definite but inconspicuous deviation from this norm, however, was set by the leading case of *United States v. Falcone*.⁵⁶ The question presented to the Supreme Court was whether "one who sells materials with the knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws."⁵⁷ The Court of Appeals had concluded in the same case that a vendor's conspiratorial liability under such circumstances not be predicated on anything short of knowledge of, and participation

55. See Note, 261 IOWA L. REV. 122, 123 (1940) and cases cited therein.

56. 311 U. S. 205 (1940).

57. *Id.* at 206.

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in, the purchaser's conspiratorial activities.⁵⁸ The Supreme Court affirmed:

[One] who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.⁵⁹

Unembarrassed by the Supreme Court decision, subsequent cases have paid lip-service to the Supreme Court language, but have essentially followed their own bent. *United States v. Harrison*⁶⁰ confronted a substantially similar question in the light of the earlier Supreme Court decision:

That question . . . [was] the legal position vis-a-vis a conspiracy of a seller who knows that the goods he supplies are destined for an illegal use, or in other words, of a 'wise' owner of innocent goods which contribute to the operation of an illegal distillery. We can start with the assumption that an intention to become a party to an illegal enterprise must be predicated on some affirmative action. . . . The sale of goods surely constitutes affirmative action.⁶¹

Affirming the conviction obtained below, the court, however, was spared the difficulty of attributing the defendant's affirmative action solely to the act of sale. Other overt behavior manifestations in aid of the conspiracy were available.⁶²

In *United States v. Direct Sales Co.*,⁶³ the court sustained the assertion of a conspiratorial link between the defendants against legal challenge upon these facts. The defendant Direct Sales Company, a manufacturer of narcotics, had repeatedly solicited the patronage of the defendant physician by the mailing of standard advertising. The defendant physician had responded to this solicitation by a mail order of morphine sulphate in quantities far in excess of the needs of the ordinary legitimate medical practice.

[The defendant physician] was submitting order forms for one thousand half-grain tablets of morphine sulphate on an average of every five days, and . . . [later] more often.⁶⁴

A warning delivered to the Direct Sales Company by a Narcotics Agent to the effect that the average physician could not find

58. *United States v. Falcone*, 109 F. 2d 579, 581 (2d Cir. 1940).

59. 311 U. S. 205, 210-211 (1940).

60. *United States v. Harrison*, 121 F. 2d 930 (3rd Cir. 1941).

61. *Id.* at 932-933.

62. *Id.* at 934.

63. 44 F. Supp. 623 (W. D. S. C. 1942). Cf. generally, *Carrado v. United States*, 210 F. 2d 712 (D. C. Cir. 1954).

64. *Id.* at 625.

a legitimate market for morphine in such quantities produced no change in the developing pattern of order and shipment.

Investigation revealed that the defendant physician was dispensing these drugs to addicts in violation of federal law. The Court held that this Narcotic Act violation was in pursuance of a common criminal conspiratorial design agreed to between vendor and vendee and hence chargeable to both:

Direct Sales Company was *bound* to know that . . . [the defendant physician] was buying morphine . . . for unlawful purposes. . . . An unlawful agreement need not be shown to exist in any formal way. In fact, it is a rare thing that an unlawful agreement can be so shown. A mutual understanding between the parties . . . is all that is necessary to prove a conspiracy. . . . The guilt of a conspirator is not dependent on his knowledge of the entire scope of the conspiracy, and one conspirator need not know who all the other conspirators are.⁶⁵

It appears clear that the choice between severity and leniency in the application of the conspiracy doctrine to vendors of "contraband" is determined by judicially preferred social and political interests. A choice between contrasting doctrines, depends, it has been observed, "upon an evaluation of how each best protects the social, individual and commercial interests involved. On the one hand, freedom of enterprise would be curbed if sellers were forced to select their purchasers with care in order to prevent becoming involved in their plans and conduct. Also, sellers should be protected from prosecutors who seek to prosecute as co-conspirators all those who have been associated in any degree whatever with the main offenders. On the other hand, perhaps the seller should be regarded as a co-conspirator, since his association with the conspiracy actually goes beyond a sympathetic attitude or acquiescence; his contribution is physical and essential to their success. It would seem that the social interest invaded by such active assistance should be protected."⁶⁶

In any event a substantial question of what would ordinarily be viewed as legislative policy is resolved by the courts under the auspices of an elastic law of conspiracy.

It thus appears that successful vendor-vendee prosecutions for conspiracy to traffic in contraband, of the type noted above, are founded upon a demonstrably consummated objective harm of some consequence. The latter is invariably discoverable in either the circulation or concealment of the contraband. In this context no seller, for example, has been held criminally responsible, unless

65. *Id.* at 626-627 (italics supplied).

66. Note, 26 IOWA L. REV. 122, 125 (1940).

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he has in fact in some degree facilitated the forbidden traffic and, one might add, with a bow to technical purists—unless he has entertained the necessary conspiratorial purpose. In successful prosecutions, actual facilitation of such traffic has been established by clear and convincing evidence—"beyond reasonable doubt"; it is only the establishment of the necessary conspiratorial purpose which often seems to have been lacking in persuasiveness. While the ease with which the requisite intent can be attributed to the defendant under such auspices may seem objectionable at first blush, it is no more so than the comparable disposition of questions of state of mind under the auspices of the absolute prohibitions encountered in increasing numbers in the field of regulatory legislation.⁶⁷ Despite their differences in background, the offenses in both categories, appear operative as substantive crimes.

The manifest effect of immediate harm to the social order is at least equally inherent within the violation of the Sherman Act—at least in terms of operative policy preferences. Remedial legislation, designed for the maintenance of a preferred form of economic equilibrium, the Sherman Act⁶⁸ had been significantly if partially accepted in "the belief that great industrial consolidations are inherently undesirable regardless of their economic results."⁶⁹ The tendency of the contemporary judicial elite has been to attribute the legislation to fear of the "curse of bigness" and hence to the "desire to put an end to great aggregations of capital because of the helplessness of the individual before them."⁷⁰

In the light of such an interpretation of dominant ecopolitical (economic-political) policy, conspiracies in restraint of trade and conspiracies to monopolize stand on the same footing as judicially recognized "substantive evils" as price-fixing or the acquisition of the power to monopolize, etc.⁷¹ Since the Sherman Act is thus viewed as directed at all manner of undue aggregations of economic power, an economic conspiratorial association or combination is without more as clearly demonstrable a substantive evil as an illegal monopoly. This is so because like the monopoly, it contributes to a greater or lesser extent to the "helplessness of

67. *United States v. Dotterweich*, 320 U. S. 277 (1943); *United States v. Darby*, 312 U. S. 100 (1941); See also Jackson, *Absolute Prohibition in Statutory Offences* in DAVIES, JACKSON, KENNY, RADZINOWICZ, STALLYBRASS, TURNER, WADE, WORTLEY, *THE MODERN APPROACH TO CRIMINAL LAW*, COLLECTED ESSAYS, (Preface by Winfield), 262 (1945).

68. See, e. g., 15 U. S. C. §§ 1, 2 respectively outlawing conspiracies in restraint of trade and conspiracies to monopolize.

69. *United States v. Aluminum Company of America*, 148 F. 2d 416, 428 (2d Cir. 1945), per L. Hand, J.

70. *Ibid.* The opinion also provides valuable excerpts from congressional statements in documentation of legislative history, as e. g., 21 CONG. REC. 2460.

71. See, e. g., *American Tobacco Co. v. United States*, 328 U. S. 781 (1946).

the individual" before its bigness: "Mere size . . . under the present concept of the higher courts, carries with it an opportunity for abuse that cannot be ignored."⁷²

Conspiracies in this field are thus indistinguishable from the traditional substantive crimes as completed rather than inchoate offenses—with this difference—that in conspiracies under the Sherman Act the Government is prosecuting a substantive crime which is the product of judicial ingenuity instead of democratic legislation. Proof of agreement within such a context constitutes a legal fiction and does not tend to enforce a rational evidentiary requirement. It is thus that "economic activities which operate in fact to restrain trade" are attributed to individuals who although capable of exerting effective control over such practices are in no way rationally proved to play the role of conscious participants in the emerging economic plan which is labelled criminal.

The fact that the proof of illegal agreement within such a context constitutes a fiction is now demonstrable by a plethora of evidence. A mere sampling should suffice.

It has thus been shown that an "anti-trust prosecution" for an alleged conspiracy, can attempt "to establish the necessary 'joint action' within the confines of the single enterprise. And in a large measure courts have viewed these attempts with favor, looking more to the economic abuses before them than to the doctrinal issue presented."⁷³

It is under such circumstances that it is "revealed" to be in the nature of things that a manufacturing corporation can conspire "with its wholly owned sales and financing subsidiaries" to violate the anti-trust laws,⁷⁴ that the officers of a corporate enterprise are capable of conspiring with the corporation in the same vein, the individuals and the corporate unit being counted as separate "persons", and that, similarly, two or more corporations can similarly conspire with each other to their hearts' content.⁷⁵ It is difficult in this light to sustain the contention that the requirement that there be two or more persons for a commission of a conspiracy has not been eliminated to all intent and purposes.

However, it is not only the easy satisfaction of the requirement that there be two or more persons for the commission of

72. CARR, *AN AMERICAN ENTERPRISE*, 234 (1952).

73. Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 *YALE L. J.* 372, 374 (1954) and cases cited therein.

74. *Id.* at 375.

75. See generally, comment, *Intra-Enterprise Conspiracy Under Sherman Act*, *supra* note 73; *Are Two or More Persons Necessary to Have a Conspiracy Under Section I of the Sherman Act?* 43 *ILL. L. REV.* 551 (1948).

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conspiratorial activities, but also the relaxation of traditional standards of general proof, which serve to show the unlawful agreement as an empty fiction in the conspiracy prosecutions under the Sherman Act.

The very scope and complexity of the contemporary economic practices tending toward monopolies or restraints of trade have enabled anti-trust enthusiasts to conceal policy preferences under the guise of procedural necessity. It is, of course, readily recognized that a "unique aspect of . . . (anti-trust) issues is their typical vastness of scope, whether the issue be one of industry history, the purpose and effect of some continuing distribution practice or the scale of operation necessary to draw the maximum benefit from modern technology and to contribute to the future development of that technology."⁷⁶

Obviation of such difficulty has proceeded by way of objectification of the "state of mind", traditionally associated with the requisite *specific intent*. The test generally adopted by the courts under such circumstances is not so much whether the defendants knew of the consequences of their planned activities but rather whether they should have known. In the leading case of *Interstate Circuit v. United States*, the Supreme Court imputed the necessary intent and participation in a common criminal design to restrain trade, allegedly engaged in by distributors of motion pictures in these words:

[A]s is usual in [such] cases of alleged unlawful agreements . . . the government is without the aid of direct testimony . . . In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators. . . .

It [is] enough that, knowing that concerted action was contemplated . . . the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that co-operation was essential to successful operation of the plan. They knew that the plan, if carried out would result in a restraint of commerce . . . and knowing it all, participated in the plan.
. . . .

Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.⁷⁷

76. Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L. J. 1019 (1949).

77. *Interstate Circuit v. United States*, 306 U. S. 208, 227 (1939); cf. *Marino v. United States*, 91 F. 2d 691 (9th Cir. 1937); *United States v. Motion Picture Patents Co.*, 225 Fed. 800 (E. D. Pa. 1915).

It is almost as if the ancient common law maxim, applied to crimes requiring a general intent, has been resurrected within the field of conspiracies in restraint of trade, to wit that men are presumed to intend the natural consequences flowing from their actions. It may thus be clearly established that an alleged conspirator was wholly ignorant of the purposes of the conspiracy as of the time of his initial adherence to the common purpose. It suffices, that having been *able*, as a reasonable man, to discover such purposes through prolonged collaboration or association with his "co-conspirators" he persisted in such collaboration or association, to hold him liable under the chameleon-like conspiracy doctrine of our time. The courts have made short shift of any defenses based upon ignorance of purpose at the inception of conspiratorial activities:

It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued each became familiar with its purpose and scope.⁷⁸

A virtual scrapping of any requirements of the state of mind, traditionally associated with specific intent was effected by the Supreme Court in the case of *United States v. Patten*:

[T]he conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are in legal contemplation, chargeable with intending that result.⁷⁹

It is not difficult to see how the peculiar characteristics of the anti-trust conspiracy prosecution, brought about both by the judicially enforced "improvement" of an allegedly defective formal substantive law and the inherent difficulty in the procurement of evidence, have brought about a situation which is *sui generis*.

As in the case of successful conspiracy prosecutions for traffic in contraband, the successful conspiracy prosecutions for monopolies or for restraint of trade are founded upon a demonstrably consummated objective harm of some consequence—that is if one accepts current judicial policy predispositions. In successful prosecutions of this kind the fact of dangerous economic aggregation or of tendencies toward restraint of trade, as necessary consequences of evolving business patterns have similarly been established by

78. *United States v. Masonite Corp.*, 316 U. S. 265, 275 (1942).

79. *United States v. Patten*, 226 U. S. 525, 543 (1913); cf. *People v. Spevack*, 253 App. Div. 638, 3 N. Y. S. 2d 633 (1st Dep't 1938); *People v. Sheldon*, 139 N. Y. 251 (1893).

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clear and convincing evidence—"beyond reasonable doubt"; it is only the establishment of the necessary conspiratorial purpose which often seems to have been lacking in persuasiveness.

An essentially identical usage, it will be recalled, has characterized the disposition of intent in the operation of the absolute prohibitions of regulatory legislation and has been accepted in that field without dire results.

A demand for the enforcement of the anti-trust laws, as judicially defined, can, in the absence of additional legislative remedies, be met only by the continuance of present judicial practice.

Only necessity would appear to justify this judicial activism. A democratically voiced, if not formalized demand for the enforcement of the anti-trust laws, absent other legislative remedies, would appear to constitute such a necessity.

One would suppose, however, that notwithstanding legislative acquiescence in this type of judicial legislation the conspiracy rules evolved within such a context would be rigidly confined to it and not permitted to extend to any other area. This is not the case. It is noteworthy that ". . . [without] recognizing that the remedial nature of such statutes [i. e. anti-trust statutes] inevitably has affected decisions thereunder, courts have sometimes on the authority of such decisions held proof of specific intent unnecessary in other types of conspiracy cases."⁸⁰ The incubus created by the law of conspiracy in this manner has not been confined to a mere handful of new prosecutions. It has instead spread its tentacles into a wide variety of fields not least of which is the political conspiracy.

IV.

The assertion that "[the] picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats, close together belongs to a darker age" has been increasingly challenged as misleading when applied to the essentially political sphere of conspiratorial activity.

Under the strain and stress of the bipolarization of world power, Communists (universally recognizable by subservience to Soviet interests) have indeed come to be viewed as "sinister persons" who, if not "meeting by twilight with pointed hats" can be counted on at *all* hours to be engaged in more mischief with less melodrama.

80. *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 280-282 (1948) and cases cited therein.

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In increasing measure public attitudes have tended toward the identification of the Communist as a threat toward the internal as well as the external security of the non-Communist nation. An official United States position has been concisely expressed by Attorney-General Brownell:

Let us not delude ourselves any longer. We might just as well face up to the fact that the Communists are subversives and conspirators, working fanatically in the interest of a hostile foreign power. Again and again they have demonstrated that an integral part of their policy is the internal disruption and destruction of this and other free governments of the world.⁸¹

In this light the political conspirators encountered at this stage and the economic conspirators, visited above, appear poles apart.

No uncertainty in public attitudes beclouds the approach to the security problems of the times.

Recent security legislation provides sufficient proof of the availability of the legislative weapon against subversion.⁸² An expanding system of criminal sanctions can be readily invoked to repress the perceptible manifestations of social harm in the field of security.

To the extent to which it succeeds in avoiding the existing substantive (non-conspiratorial) legislative prohibitions, political conspiracy looms largest as an inchoate crime whose social harm is manifested in the future. In this context the primary function of conspiracy law would appear preventive.

It is elementary that every organized government will seek to secure its authority against organized violence. Survival itself is at stake. Reason dictates not only the repression but the prevention of disturbances threatening social disintegration. The rejection of anarchy as a way of life suffices to require the rejection of "any principle of governmental helplessness in the face of preparation for revolution."⁸³ It follows that "it is within the power of the Congress to protect the government of the United States from armed rebellion . . . No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the government by force and violence."⁸⁴

81. Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L. Q. 195, 201 (1954).

82. See, e. g., *Comment, The Internal Security Act of 1950*, 51 COL. L. REV. 606 (1951).

83. *Dennis v. United States*, 341 U. S. 494, 501 (1951).

84. *Ibid.*

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How far, then, must the meshes of the law be spread to fulfill the necessary preventive function in such cases?

None can question the reasonableness of the attempt of the law to spare the country the impact of such disturbances as insurrection, espionage, sabotage and kindred offenses against its security by "nipping the plan in the bud" long before its consummation.

In such a context the law of inchoate crimes cannot dispense with the conspiracy doctrine if it is to fulfill any significant preventive function. None can question, therefore, the reasonableness of the superimposition of the general prohibition against conspiracy⁸⁵ over the various overt crimes against security. In the fulfillment of such a preventive function it makes sense to prosecute under a general or a special conspiracy statute⁸⁶ for an agreement to commit espionage,⁸⁷ sabotage⁸⁸ or kindred crimes long before the infliction of any substantive harm. It makes sense to punish a "seditious conspiracy," encompassed whenever "two or more persons . . . in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the government of the United States or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States . . ."⁸⁹

If no formal agreement between such conspirators need be proved it is because the conspiratorial methods are indeed "devious, hidden, secret and clandestine" and an agreement for the procurement of overt acts of violence or those bordering upon violence is subject to rational inference from available overt behavior patterns.⁹⁰ The inferential nexus between the manifestation of acts and the agreement to act need never become dangerously tenuous.

A radically different situation, however, arises under a law which authorizes a conspiracy prosecution on the theory that two or more persons conspired to help to organize a group preparing to advocate the desirability of the overthrow of government by

85. 18 U. S. C. § 371.

86. The general conspiracy statute is 18 USCA § 371. A good example of a special conspiracy statute is 18 USCA § 794 which provides for the infliction of identical penalties for conspiracy to violate as well as the actual violation of certain espionage prohibitions.

87. See 18 U. S. C. §§ 792-797.

88. See 18 U. S. C. §§ 2152-2156.

89. 18 U. S. C. § 2384.

90. See, e. g., *Wells v. United States*, 257 Fed. 605 (9th Cir. 1919); *Bryant v. United States*, 257 Fed. 378 (5th Cir. 1919); cf. *United States v. Georgia*, 210 F. 2d 45 (3d Cir. 1954).

force and violence.⁹¹ The statutory link between the individual and the illicit end is patently too tenuous to maintain a meaningful requirement of proof of a specific intent. As in cases of economic conspiracy, the "finding" of a conspiratorial agreement must of necessity rest upon inference piled upon inference. In *Dennis v. United States*⁹² the top Communist leadership was accused of:

[W]ilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society . . . of persons who teach and advocate the overthrow and destruction of the government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the government of the United States by force and violence⁹³—

a far cry indeed from the accusation encountered in the prosecution of an economic conspiracy. Yet the "chameleon-like" law of conspiracy of this case seemed essentially reflective of that of such a classic in the field of economic conspiracy as *Interstate Circuit v. United States*.⁹⁴

Evidence, essentially reflective of parallel activities by the defendants, sufficed in the final analysis, to establish the requisite conspiratorial agreement in each case. In *Interstate Circuit v. United States*, the conspiratorial liability emerged from essentially no more than the parallel acceptance by defendants of uniform commercial practices; in *Dennis v. United States*, the conspiratorial liability emerged from essentially no more than the parallel acceptance by defendants of uniform political proselytizing practices.

91. 18 U. S. C. § 371 provides:

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years or both.

18 U. S. C. § provides *inter alia*:

Whoever organizes or helps or attempts to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of . . . government by force or violence . . . Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both . . .

For obvious reasons these two enactments lend themselves to combined use. 92. 341 U. S. 494 (1951).

93. *Id.* 497.

Cf. *id.* at 579, Mr. Justice Black, dissenting:

"At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the government. They were not even charged with saying anything or writing anything designed to overthrow the government. The charge was that they agreed to assemble and to talk and to publish certain ideas at a later date. The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the government."

94. 306 U. S. 208 (1939).

CONSPIRACY REVISITED

That the same doctrinal variation of conspiracy had been made to fit both situations was in fact explicitly assumed by Mr. Justice Jackson, concurring, not without some misgivings, in *Dennis v. United States*.⁹⁵

Conspiracies of labor unions, trade associations, and news agencies have been condemned, although accomplished, evidenced and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches and organization. Indeed this court seems particularly in cases where the conspiracy has economic ends, to be applying its doctrines with increasing severity. While I consider criminal conspiracy a dragnet device . . . no reason appears for applying it only to concerted action claimed to disturb interstate commerce and withholding it from those claimed to undermine our whole government.

Since the standard of proof of agreement is thus admittedly subjective and hence unpredictable, the conspiracy doctrine operates, in effect, to repress completed yet undefined activities; punishable conspiracies thereby take on the appearance of substantive rather than inchoate crimes. (The preventive role of conspiracy as an inchoate crime would depend on an effective retention of the traditional specific intent.) In the meantime, the political conspiracy of the *Dennis* type confronts us as a judge-made law of substantive crime on an *ad hoc* basis. Its vagueness provides unlimited possibilities for abuse.

It has been rightly remarked in this connection:

[under] such circumstances the limits of permissible political action would become obscure and therefore seriously restricted. In actual operation a program of this nature could be carried out only through an apparatus of secret political police, informers, and undercover agents, and amid an atmosphere of public passion and fear.⁹⁶

If, therefore, the protection of the individual defendant still remains of some concern to democratic social order, however greatly threatened by totalitarian violence, the conspiracy prosecution does not present a fair or rational method of defense. If the repression of specific political group activity appears mandatory, outlawry of specific organizations under legislative auspices would be preferable to conspiracy prosecution under present law.

However unfamiliar to the American scene outlawry under legislative auspices would have definite advantages, not enjoyed

95. 341 U. S. 494, 572 (1951).

cf. *United States v. Foster*, 9 F. R. D. 367 (D. N. Y. 1947).

96. Memorandum in support of defendants' motion to dismiss the indictment, filed in the District Court of the United States for the Southern District of New York in the case of *United States v. Flynn* by Frank Serri and Thomas I. Emerson in 1951.

under varying forms of conspiracy prosecution under present law. It would thus provide advance notice of its scope with adequate clarity; it would establish essential standards of certainty for its administration; it would bar the retractivity of its application. In any case it would eliminate the possibility of the irresponsible and invisible exercise of power through judge-made law. Distasteful though it might be it would be more representative of "government of laws and not of men" than most contemporary conspiracy practices outside the scope of inchoate crimes. This appears to have been the solution reached in some situations on the European continent.⁹⁷

CONCLUSION.

The problem presented is essentially a matter of politics and hence legislative policy. This, however, does not exonerate the courts. Compelled though they are to resort to the conspiracy doctrine at the instigation of the prosecution it is high time that they recognized the conspiracy doctrine for what it is, i. e., that it does not require the proof of specific intent in a large number of cases, as it would appear to do on a superficial reading of the statutes. This the courts should say. Let the courts under such circumstances proclaim the requisite "agreement" to be a mere legal fiction. The legislatures may then be aroused to set things right by an informed electorate.

⁹⁷. See Wagner, *Conspiracy in Civil Law Countries*, 42 J. CRIM. L. & CRIMINOL. 171 (1951).